

BEFORE THE STATE PERSONNEL BOARD OF THE STATE OF CALIFORNIA

In the Matter of the Appeal by)

CALIFORNIA SCIENCE CENTER)

from the Executive Officer's August 23, 2001)
Disapproval of a Contract with Swayzer's)
Inc. for grounds maintenance services at)
Exposition Park, Los Angeles, in response)
to the request for review submitted by the)
International Union of Operating Engineers)

BOARD DECISION

PSC NO. 01-08

March 5, 2002

APPEARANCES: Adam Stern, Attorney, on behalf of the International Union of Operating Engineers; Barrett McNerney, Staff Counsel, Department of Personnel Administration, on behalf of the California Science Center.

BEFORE: Ron Alvarado, President; William Elkins, Vice President; Florence Bos and Sean Harrigan, Members.

DECISION

The California Science Center (CSC) has appealed to the State Personnel Board (Board or SPB) from the Executive Officer's August 23, 2001 decision, which disapproved a Contract (Contract) entered into by CSC with Swayzer's Inc.(Contractor) for grounds maintenance services at Exposition Park, Los Angeles. In this decision, the Board finds that CSC has failed to show that the Contract is justified under Government Code § 19130(b). The Board, therefore, sustains the Executive Officer's decision disapproving the Contract.

BACKGROUND

On September 13, 1999, in accordance with Government Code § 19131, CSC notified SPB of its intention to enter into a cost-savings contract under Government Code § 19130(a) with the Contractor for grounds maintenance services at Exposition Park. At its Board meeting on November 1-2, 2000, the Board adopted the proposed decision of an Administrative Law Judge that disapproved the cost-savings contract, finding that CSC's attempt to support the contract with a new cost analysis that had not been submitted previously to SPB prior to the evidentiary hearing would "circumvent the established procedures for SPB review and approval of cost savings contracts under Government Code sections 19130 and 19131." At its meeting on February 6-7, 2001, the Board denied CSC's petition for rehearing.

The Contract in this case calls for the Contractor to provide grounds maintenance services at Exposition Park from May 1, 2001 through April 30, 2002. According to CSC, the Contract is an interim emergency contract that will remain in place until a new request for proposal can generate a new cost-savings contract for SPB's approval under Government Code § 19130(a). The International Union of Operating Engineers (IUOE) has challenged the Contract, asserting that the contracted services can be provided adequately and competently by civil service employees.

PROCEDURAL HISTORY

By letter dated May 30, 2001, IUOE asked SPB to review the Contract for compliance with Government Code § 19130(b). On July 3, 2001, CSC submitted its response to IUOE's request. On July 12, 2001, IUOE submitted its reply to CSC's response. CSC submitted a letter dated July 23, 2001 in response to IUOE's July 12, 2001 reply. On August 2, 2001, CSC filed the Declaration of James L. DeJournett in support of the Contract. On August 3, 2001, IUOE objected to CSC's July 23, 2001 letter and DeJournett's Declaration, asserting that the Board's regulations only permit the filing of a union request for review, a department response and a union reply, and do not permit the parties to submit any further arguments or documents to support their positions. On August 6, 2001, CSC submitted a letter that asserted that SPB's acceptance of CSC's supplemental information would not violate the applicable regulations or be "prejudicial" to IUOE. On August 13, 2001, IUOE objected, asserting that CSC's untimely submissions were prejudicial to IUOE and SPB should, therefore, not accept them. The Executive Officer issued his decision disapproving the Contract on August 23, 2001.¹

The Board has reviewed the record, including the written arguments of the parties, and heard the oral arguments of the parties, and now issues the following decision.

ISSUES

Is the Contract justified under Government Code §§ 19130(b)(8) and/or (b)(10)?

¹ The Executive Officer's decision found that he did not need to reach the issue of whether CSC's July 23 letter or DeJournett's August 2nd Declaration constituted impermissible submissions under applicable Board regulations because he found that, even if those submissions were accepted by SPB, they would not provide sufficient supporting information to show that the Contract is justified under Government Code § 19130(b). The Board adopts the Executive Officer's determination with respect to IUOE's objections.

DISCUSSION

Government Code § 19130(b)(8)

CSC asserts that the Contract is justified under Government Code § 19130(b)(8), which permits a state agency to enter into a personal services contract with a private entity when:

The contractor will provide equipment, materials, facilities,
or support services that could not feasibly be provided by the state
in the location where the services are to be performed.

In his decision, the Executive Officer found that, because the landscaping services provided by the Contractor in this case are provided in Los Angeles, it is implausible that sufficient employees and equipment could not “feasibly” be provided by CSC in that city. CSC asserts that, while Los Angeles may not have a manpower shortage, it was infeasible for CSC to obtain the Department of Finance’s approval, hire enough supervisors and employees, train those employees, and secure the necessary equipment to perform the services as quickly as needed after SPB disapproved its proposed cost-savings contract. According to CSC, its immediate need for landscaping services made the assembly of its own landscaping crew impractical in the short-run, and the costs that CSC projects it will save when it compiles the information to support a new cost-savings contract made it uneconomical in the long run to purchase the necessary equipment and hire the needed civil service employees.

CSC asserts that its position in this case is very similar to that of the Department of Veterans Affairs (DVA) in California State Employees Association, PSC Case No. 98-04. In that case, the Board permitted DVA to rely upon Government Code § 19130(b)(8) to justify a contract for laundry services by showing that it would have been prohibitively expensive to build new laundry facilities at the Barstow Veterans Home to provide the needed services because the Home was designed and built without such facilities. Given the enormous building expenses that DVA would have had to incur to build a new laundry facility, the lack of space for a new laundry facility on the Home’s existing site, and the relatively small cost of the laundry contract when compared to the projected construction costs, the Board determined that it was not feasible for DVA to provide the laundry services utilizing civil service employees at the Barstow Veterans Home.

The facts in this case are very different from the facts in PSC No. 98-04. In this case, CSC has not shown that it would have to build an entirely new, expensive building in order to perform the landscaping services that the Contractor provides. While CSC may assert that it is not economical to hire civil service employees and purchase equipment to perform landscaping services when it believes that it will eventually be able to show that it will pay less for those services if it contracts for them, Government Code § 19130(b)(8) sets a higher standard than merely showing cost-savings.² Government Code § 19130(b)(8) requires that CSC must show that it could not “feasibly” provide the services, in other words, that it is not capable of providing the equipment or personnel to perform the contracted services in Los Angeles.³ CSC has not provided the Board with

² If CSC wishes to argue that it is uneconomical to provide the services utilizing civil service employees, it needs to submit the cost-savings justification under Government Code § 19130(a) that it keeps promising.

³ See the Merriam-Webster Collegiate Dictionary at <http://www.m-w.com/cgi-bin/dictionary?feasibly>, which defines “feasible” to mean “capable of being done or carried out.”

sufficient information to meet this standard. CSC has, therefore, failed to show that the Contract meets the criteria of Government Code § 19130(b)(8).

Government Code § 19130(b)(10)

CSC also asserts that the Contract is justified under Government Code § 19130(b)(10), which authorizes a state agency to enter into a personal services contract with a private entity when:

The services are of such an urgent, temporary, or occasional nature that the delay incumbent in their implementation under civil service would frustrate their very purpose.

In order to comply with Government Code § 19130(b)(10), CSC must show that the Contract meets both of its conditions: (1) the contracted services are either urgent, temporary or occasional; and (2) the purpose of those services would be frustrated by the delay in hiring civil service employees to perform them.

CSC asserts that it entered into the Contract as an interim measure while it prepares the necessary support for a new cost-savings contract. It contends that, in order to provide for an effective groundskeeping crew for Exposition Park, it would have to hire, train and equip a staff of 28 employees. CSC asserts that the significant amount of time and money that it would have to expend in order to hire, train and equip so many employees would be an extraordinary waste of state time and resources when it is confident that it will soon submit a new contract that will satisfy the requirements for a cost-savings contract under Government Code § 19130(a). CSC argues that, because its need for landscaping services was immediate and temporary, the Contract is justified under Government Code § 19130(b)(10).

The timing of CSC's actions in this case undermine its arguments. CSC filed its original cost-savings contract for SPB review in September 1999. The Board disapproved that proposed cost-savings contract in November 2000. The Board denied CSC's petition for rehearing with respect to that disapproval in February 2001. CSC entered into the Contract in this case in May 2001 to run through April 2002. To date, CSC has not filed a new proposed cost-savings contract with SPB for review. It appears that, if the Contract were needed only as an emergency interim contract to tide CSC over until it could get to SPB a proposed cost-savings contract, CSC would have acted with more speed, first, to get the interim contract in place and, second, to get to SPB the proposed cost-savings contract, and the interim contract would have been of much shorter duration. CSC's delay in entering into the Contract, the one-year term of the Contract and CSC's failure to submit a new proposed cost-savings contract for SPB review preclude the Board from finding that the Contract was either as urgent or as temporary as CSC now argues.

In addition, CSC has also not shown that retaining civil service employees to perform the contracted landscaping services would have frustrated the very purpose of the Contract. The contract whose purposes CSC argues would be frustrated is the cost-savings contract that CSC anticipates entering into in the future, not the Contract now before the Board. Since September 1999, CSC has asserted that it will be able to prove to the Board that it will save significant costs if it contracts for landscaping services instead of hiring civil service employees to perform them. It has been over a year since the Board disapproved CSC's proposed cost-savings contract. The Board would have expected that CSC would have filed their new proposed cost-savings contract very shortly after the original proposed contract was disapproved. To date, CSC has not submitted either a new proposed cost-savings contract or adequate substantiation to show that it

will accomplish the cost-savings that it forecasts. While the Board stands ready to review any cost-savings contract CSC may eventually submit, there is not sufficient evidence currently before the Board to support CSC's assertions that hiring civil service employees to perform the contracted work would frustrate the very purpose of those contracted services.

CSC has, therefore, failed to show that the Contract is justified under Government Code § 19130(b)(10).

CONCLUSION

The Board finds that CSC has not adequately shown that the Contract is justified under either Government Code § 19130(b)(8) or § 19130(b)(10). The Board, therefore, sustains that Executive Officer's decision disapproving the Contract.

STATE PERSONNEL BOARD

Ron Alvarado, President
William Elkins, Vice President
Florence Bos, Member
Sean Harrigan, Member

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I hereby certify that the State Personnel Board made and adopted the foregoing Decision at its meeting on March 5, 2002.

Walter Vaughn
Executive Officer
State Personnel Board

[CSC-IUOE-01-08-dec]